

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Guidant Corp. Implantable
Defibrillators Products Liability Litigation

MDL No. 1708
(DWF/AJB)

This Document Relates to ALL ACTIONS

**Lead Counsel Committee's Response to the Court May 26, 2010 Order
for a Status Report of Outstanding MDL Settlement Issues**

MAY IT PLEASE THE COURT:

On May 26, 2010 this Court requested a status update on all issues remaining to resolve in the Guidant MDL Settlement, specifically including the calculation of the final ratchetback amount to be applied to all claimants' settlement allocations. Since the Court's first distribution order, the LCC has worked steadfastly to resolve the outstanding settlement issues relating to the hold-back provision to ensure that final distributions can be made as soon as possible. As this Court is well aware, the Guidant MDL Settlement continues to have a handful of issues that remain to be resolved before the settlement can be brought to its conclusion and final distributions can be made.

First, final participation needs to be concluded and agreed to by the parties. Second, deadlines must pass for late participants to object to allocations made by the Claims Review Committee and for review of any such objections by Magistrate Boylan as

Special Master to the MDL Settlement. Finally, Third Party Payor (“TPP”) resolution programs need to be implemented and concluded.

This memorandum is to provide an update to the Court on the progress of these remaining issues and provide insight into the timing of the final distribution for Guidant MDL Settlement participants.

Origination of Hold Back Amounts

On December 1, 2008, Plaintiffs provided Guidant with settlement documents for 95% of the eligible settlement participants. After reaching this participation threshold, the parties agreed that though some outstanding issues remained the vast majority of claimants’ obligations under the Master Settlement Agreement (MSA) had been met and the parties further agreed that these claimants could be eligible for a partial payment immediately. The heldback funds, although already paid by Guidant and Boston Scientific into the settlement fund, were not to be released to claimants until further order of this Court once the outstanding issues had been resolved by the parties. The amount of funds held back by Court order were contingent on Medicare and Medicaid obligations as determined by The Garretson Firm, possible participation in Lien Resolution Programs and future ratchetback under Section II(A)(1) of the MSA. Depending on an individual claimant’s circumstances, a claimant’s heldback amount could range between 5% and 25% of their gross allocation.

Ratchetback Calculation: Background

Under Section II(A)(1) of the Master Settlement Agreement, if Plaintiffs are unable to produced 8400 settlement participants the final settlement amount owed by Guidant would be reduced proportionally:

Reduction in Settlement Fund Based on Participation. To the extent that fewer than 8400 Claimants participate in the Settlement as "Participating Claimants" (as defined in Section III.F.3), the amount of the Settlement Fund will be reduced by an amount equal to the difference between 8400 and the number of Participating Claimants, divided by 8400, and multiplied by \$240,000,000. As an example, if there are 8300 Participating Claimants (i.e., 100 less than 8400), the amount of the Settlement Fund will be reduced by \$2,857,143 ($[(8400 - 8300) / 8400 \times \$240,000,000]$) to \$237,142,857.

Previously, the LCC and Guidant were in disagreement as to the final implementation of this section of the MSA, specifically the definition of "Participating Claimant". Under the Court's December 4, 2009 decision, Plaintiffs did not produce the number of participating claimants necessary to void any potential ratchetback under Section II(A)(1) of the MSA. Therefore, a final ratchetback amount will be required once the final participation number and total allocation amount have been determined.

Final Participation Number: Completed

In order to ensure that the opportunity to participate in the Guidant MDL Settlement Program was available to all interested claimants, the LCC and the Court continued to make efforts to reach out to all non-participating claimants.¹ The LCC, through Liaison

¹ Non-participating claimant is defined in this case as a settlement eligible claimant who had not submitted the required settlement participation forms as required under the MSA.

Counsel, has worked since 2008 to reach out and provide assistance to any non-participating *pro se* claimant with questions and concerns. In addition to the LCC's efforts, the Court extended specific participation invitations, by way of letter from the Court, to claimants and/or their counsel who had yet to submit any settlement participation paperwork. The Court went through the extraordinary effort of having a conference call with all non-participating claimants in order to provide insight into the settlement process and provide answers to any questions those claimants may have. Finally, early this year the Court held hearings for a small number of claimants to resolve any remaining settlement requirements between claimant and Guidant.

The end result of all of these efforts has just recently been realized with the acceptance of the final participating claimant by Guidant on May 11, 2010. A motion was filed with this Court for approval of the Special Masters' Final Allocation Report on May 18, 2010. The Court approved payment for the final group of participating settlement claimants on May 20, 2010. The Court's approval on May 20, 2010 of the Seventh Special Masters' Allocation Report provides the final participation number at 8,180 claimants. Guidant's deadline to fund this last Allocation Report is June 4, 2010.

Total Allocation Award Amount: Partial Completion

The finalization of allocation amounts for this last group of participating claimants is nearing completion. The last allocations and EIF claims were reviewed by members of the Claims Review Committee ("CRC"). A claimant or his counsel has a short period of time to object to the CRC's proposed allocation. This objection period for the last group of participating claimants will end on June 11, 2010. If there are no objections to these

allocations, the total allocation amount will be known and the final ratchetback amount can be calculated. If there are objections to these last remaining amounts, the final ratchetback calculation will be delayed until Magistrate Boylan has the opportunity to complete his review and make his final allocation determination.

Third Party Payor Global Resolution Programs: Partial Completion

Finally, in order to assist claimants with resolution of insurance reimbursement obligations, the LCC and counsel for various Third Party Payor programs (TPPs) were able to reach agreement on several global lien resolutions programs for Guidant MDL Settlement Claimants. The LCC is currently working with the TPPs to bring to a conclusion all global lien resolution programs.

Blue Cross Blue Shield and United Global Resolution Programs

On February 24, 2010, the LCC filed a motion to release funds for participants in the United Healthcare Global Lien Resolution Program. This Court approved the distribution on March 2, 2010. The LCC anticipates filing a similar motion for the Blue Cross Blue Shield participants by June 4, 2010. Despite considerable effort by all parties, a handful of Blue Cross Blue Shield participants' liens remain unresolved. Both the LCC and Counsel for BCBS anticipate those remaining liens will be resolved no later than June 30, 2010.

Other TPPs Global Lien Resolution Program

Based on information from The Garretson Firm, the lien resolution administrator for the "other TPP" resolution program, the underlying lien resolution information for

claimants participating in the other TPP global resolution program has just recently been provided by the TPPs to The Garretson Firm for processing.² Barring any major objections from the TPPs, The Garretson Firm anticipates having lien information available for Counsel and TPPs by middle of June and completion the TPP global resolution program within the next 60 days. Once final lien amounts are determined by The Garretson Firm remaining funds not needed to satisfy any lien obligation can be released to claimants by order of this Court.

Conclusion

Through the diligent work of the parties, the final pieces of the Guidant Settlement Program are near completion. The LCC anticipates that remaining issues surrounding the ratchetback determination will be concluded within the next 30 days. Though the ratchetback determination may provide a final distribution for the majority of Guidant MDL Settlement claimants, there may remain a small number of claimants who will continue to have funds heldback pursuant to the final determination of funds due under the TPP global lien resolution program. The LCC will work diligently with The Garretson Firm to ensure that this process proceeds as swiftly as possible and will advise the Court of any issues arise in that from that process. It is the LCC's expectation that any remaining issues with the TPPs' global lien resolution programs will be concluded within the next 60 days.

² This resolution program has been delayed due to late transmissions of final lien resolution information from the TPPs to The Garretson Firm. While information was due to The Garretson Firm on March 22, 2010, the LCC understands that The Garretson Firm did not receive final data from all participating TPPs until May 21, 2010.

Dated: June 2, 2010

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